IN THE

Supreme Court of the United States

October Term, 1957

No. 165

MAX LERNER,

Appellant,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

APPELLANT'S REPLY BRIEF

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INDEX

SUBJECT INDEX

Citations

CASES:

Constitutional Provisions and Statutes Cited

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APPELLANT'S REPLY BRIEF

I.

Jurisdiction.

Appellees first assert that because appellant proceeded to review his discharge by a law-suit, rather than by an administrative appeal to the Civil Service Commission, he cannot complain that the discharge violated his constitutional right to due process. This is essentially a claim that appellant failed to exhaust his administrative remedies.

It is not clear from the title to appellees' Point I or the discussion thereunder whether their challenge to this Court's jurisdiction is limited to the issue of *procedural* due process; their early motion to dismiss the appeal was

thus limited (Motion, pages 3-4). In any event, we believe that appellees' argument must be rejected for the following reasons:

(1) The appellees explicitly acquiesced in a direct review by the state courts of the constitutional issues arising from the application of the statute to appellant;

(2) Administrative proceedings are singularly inappropriate for the vindication of one's constitutional rights;

(3) Appellant had a right to accept the statutory warning, Security Risk Law, § 6, that an appeal to the Commission would result in an order not judicially reviewable. See *Levitch* v. *Board of Education*, 243 N. Y. 373;

(4) The three courts below decided the federal constitutional issues raised by the appellant; they did not suggest that appellant had been derelict in failing to exercise administrative remedies;

(5) State courts are the final judges upon such matters as the exhaustion of administrative remedies and the proper method of raising federal questions.

We shall not repeat the argument on this subject set forth in our brief in opposition to the motion to dismiss the appeal herein (pp. 7-9). We supplement that discussion with the following reminder of what actually occurred in the state courts:

(1) In the State Supreme Court, the appellees did not take their present position that appellant should have appealed to the Civil Service Commission before seeking judicial review of the legality of his discharge. Instead, appellees asserted that a Civil Service Commission decision would not be subject to jurisdictional review. On the other hand, appellees conceded that direct court review of

appellees' action without intermediate Commission action was permissible with respect to constitutional issues (Appendix, A. p. 13).

For the convenience of the Court, we have set forth relevant excerpts on this point from appellees' brief in the State Supreme Court in Appendix A to this brief.[1]

Further, in oral argument in the state Supreme Court, appellees expressed the desire to have the constitutional issues decided by that court, despite the absence of an appeal to the Civil Service Commission. The reason for this was quite clear: the principal issue in this case, as appears below, was the effect to be given to appellant's invocation of his constitutional privilege. That was not only a matter of law but of constitutional law and hence quite outside the domain of an administrative body such as the Commission.

This statement is corroborated by the character of the appellees' briefs in the two appellate courts below. In neither court did appellees argue that appellant's failure to appeal to the Commission justified judicial abstention. We note this earlier and consistent position of the appellees below not merely to indicate a waiver, but because it accorded with reality and was the reason for the full adjudication in the courts below of the principal constitutional issues raised by appellant.

Appellees' suggestion that the Commission reviewed two cases of employees of other state agencies is completely irrelevant. Neither of those cases involved a clear question of constitutional law, such as the right of employees to refuse to answer questions, (the principal issue posed by appellees) and the significance of the invocation of the constitutional privilege (the principal issue posed by appellant). In each of those cases, the employee involved an-

[1] Copies of this and other briefs filed by appellees in the state courts will be filed with the Clerk.

swered the questions put to him by his employer. The only issue remaining was whether their work was of a sensitive nature—an issue resolved by the Commission in favor of the employees.[2] As we have seen, that issue was directly resolved against appellant by the Court of Appeals in the instant case. The issue is, therefore, an appropriate one for review by this Court because it involves the constitutional rights of the appellant.

II.

The Confessed Cause of Appellant's Dismissal.

Appellees, quite understandably, seek to treat this case as one in which an employer unsuccessfully inquired of his employee with respect to matters relevant to the employment relationship, thus assimilating this case to that of *Garner* v. *Board of Public Works*, 341 U. S. 716. While we must respectfully indicate our disagreement with the majority opinion in that case, and are prepared, if necessary, to reargue the issue therein involved, we do not believe it necessary to do so because of the radical differences be-

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[2] At the time of appellant's dismissal and throughout this litigation in the state courts, the Security Risk Law was construed by the Commission and by state agencies to mean that every position in a security agency was a security risk position regardless of the innocuous nature of the work (see *e.g.*, *Matter of New York City Housing Authority* v. *Falk*, S. Ct. N. Y. Co., N. Y. L. J. Jan. 10, 1958, Petition, par. 6). This was admitted by the Attorney General in his brief, pp. 6-7 in the state Supreme Court.

Following the criticism by the Governor's Committee noted in our principal brief, Appendix B, the Commission gave a new construction to the statute in the two cases cited by the Attorney General (Br. 9). In view of the settled administrative policy during the instant litigation, it is somewhat disingenuous for appellees to suggest a possible advantage to appellant of an administrative appeal. In any event, the Court of Appeals reached a conclusion with respect to appellant's work, making the issue ripe for review by this Court.

tween the disclosure statute involved therein and the evidentiary one which is the subject of the instant litigation.

Judge Fuld's dissenting opinion below shows the difference between the Security Risk Law of New York and the Charter and Ordinance involved in *Garner* (R. 67). It is enough, therefore, at this point, to show the Court that appellant was discharged because of the inferences drawn by appellees from his invocation of the Fifth Amendment—a fact clearly appearing in the record and in the briefs filed by the appellees in all the courts below.

The basis for the appellant's dismissal was a statute authorizing such sanctions upon "evidence" that "reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation or of the state" (Br. 34).

The letter suspending appellant and reciting the charges against him stated that

> "you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

Appellees' briefs in all the courts below conceded that the invocation of the constitutional privilege against self-incrimination was the reason for discharge. It will be remembered that appellant's discharge took place in 1954, at a time when this Court's decisions on the significance of the Fifth Amendment had not as yet been rendered. (*Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Ullmann* v. *United States*, 350 U. S. 422; *Emspak* v. *United States*, 349 U. S. 190.) There was, therefore, no reason for appellees to dissimulate. Thus, appellees' reply brief in the State Supreme Court stated:

> "The test established by the Security Risk Law has been met in the instant case. Surely it cannot be

> said that it is unreasonable to conclude that a man who refuses to reply on the ground of possible self-incrimination when asked point blank about membership in the Communist Party (not a political party but a subversive organization) is a proper person to have in a position in a security agency" (page 11).

Relevant excerpts from this and other briefs of appellees in the Courts below are set forth in Appendix "B" to this brief.

III.

The Nature of the Inquiry Before the City Commissioner of Investigation.

Appellees' present attempt to treat the Commissioner of Investigation as if he had been appellant's employer is equally understandable in the light of this Court's opinion in *Garner*. It is incorrect in view of the status and functions of the Commissioner of Investigation under the New York City Charter.

We do not challenge in this Court the Commissioner's right under state law, constitutional questions aside, to investigate appellees' employees. The Commissioner has broad powers "to make any study or investigation which, in his opinion, may be in the best interests of the City, * * *" (New York City Charter, § 803). The New York courts have upheld his power to examine persons who have no employment relationship with the state or city governments (*In re Wiener*, 183 Misc. 267).

Where the difference may determine constitutional rights, we do have the right to show that the investigation by the Commissioner of Investigation is of a different character than the inquiry made by Los Angeles of its own employees. See *Garner* v. *Los Angeles Board*, 341 U. S. 716.

In the present case the Commissioner of Investigation was not acting as an employer calling for relevant data from its employees. Appellant was an employee of a state agency, the New York City Transit Authority, and not of either the Commissioner of Investigation or his employer, the City of New York. The investigation was conducted at the request of the Mayor; the record contains no suggestion that it was conducted at the request of the New York City Transit Authority.

Until later developments in this litigation made it expedient, appellees did not treat the Commissioner of Investigation as their *alter ego*. The investigation was made, said appellees in the State Supreme Court, because the City was the lessor of the transit lines (not appellant's employer) and the investigation was therefore "in the best interests of the City." (Appellees' Reply Brief, p. 3.)[3]

Further, there is a meaningful difference between an employer's request for an affidavit as to an employee's political affiliations and the sweeping investigation by the Commissioner authorized by the City Charter. The Commissioner has inquisitorial powers in the technical sense; the range of his inquiries—supported by the judicial contempt power—is very wide. The employee who discloses his own organizational connections, thus having waived his

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[3] Appellees' brief in the State Supreme Court indicates that the Commissioner's investigation was initiated by him under the Charter, § 803, and not upon appellees' instructions (Br. p. 4). Appellees' original claim of a right to utilize the Commissioner's discoveries is very different from the present claim that he should be deemed appellant's employer. Appellees put it thus in the lowest state court: "It follows that, regardless of whether, because of the City's ownership of the Transit System, the Commissioner of Investigation had the power to initiate such an investigation as that which is here involved, the Authority certainly had the right to make use of his services for investigation under Section 1105 of the Unconsolidated Laws and to accept his report and any information received from him, as a basis for its action under said Section." (Appellees' Reply Br. p. 4.)

constitutional privilege, must also name his associates. An employer, unlike an investigating official with subpoena power, cannot compel his employee to become an informer. That is certainly another sound reason for not extending the *Garner* rule—assuming that it ought to be preserved—beyond the strict employment relationship under a statute requiring disclosure to one's own employer.

Appellees did not treat appellant's action before the Commissioner as a violation of his duty to make relevant disclosure to his employer. Instead, they treated appellant's reliance upon his constitutional privilege against self-incrimination as evidence of unreliability in the same way that they would have treated its assertion before a congressional committee. (*Cf. Slochower* v. *Board of Higher Education, supra*). Thus, appellees stated in the lowest court below:

> It is submitted that under the Security Risk Law the Authority may consider and weigh evidence from any source, whether it be from the Commissioner of Investigation, the Police Department, the Federal Bureau of Investigation, or evidence of testimony before any legislative or Congressional Committee. There is no requirement of the law that the Authority is limited in its consideration to evidence developed as a result of its own investigation. Therefore, when the Commissioner of Investigation brought to the attention of the Authority the petitioner's recourse to the privilege against self-incrimination, the Authority was at liberty to consider and weigh this evidence, regardless of whether the Commissioner of Investigation was operating within his powers when the petitioner's testimony was given." (Br. pp. 7-8)

IV.

Appellees' Attempt to Distinguish Slochower.

Appellees attempt to distinguish *Slochower* upon the theory that the case has "none of the elements of automatic forfeiture present in the Slochower case" (Br. pp. 17-18). It is also said that appellees "gave careful consideration to the circumstances surrounding the asking of the question and the repeated refusal on the part of the employee to answer the question" (Br. p. 18).

There is little to be gained by an analysis of differences in factual detail between one case and another where the essential constitutional configuration is the same. Appellees' position and that of the Court of Appeals would make dismissal under the Security Risk Law equally automatic where an employee in a so-called security risk agency invoked his constitutional privilege with respect to Communist Party membership. In view of the unambiguous position taken both by appellees and the state courts, we do not understand appellees' reference to "the circumstances surrounding the asking of the question" (Br. p. 18).

Appellees' reference in this connection to the possible review by the Civil Service Commission is irrelevant in view of the definitive decision on this point by the highest state tribunal. It may be noted *en passant* that the Commission always upholds the dismissal of employees who have declined for any constitutional reason whatsoever to answer questions concerning membership in the Communist Party (See *e.g. Matter of Hehir* v. *New York City Transit Authority*, New York Sup. Ct., Kings Co., Index No. 4071 (1956); *Graham* v. *Falk* (S. D. N. Y., No. 130-51, pending)

V.

The Effect of the *Konigsberg* case.

Appellees seek to distinguish *Konigsberg* v. *State Bar of Calif.*, 353 U. S. 252 on two grounds: (1) the absence there of an employment relationship, and (2) appellant's alleged knowledge that his discharge would follow his refusal to answer.

The first point would disregard the point noted in our principal brief (p. 13), that the responsibility of members of the Bar is on an even higher level than that of a subway conductor in the civil service. The second point assumes a fact which is simply not true. The Security Risk Law, unlike the legislative enactments involved in *Garner*, contains no warning that the refusal to answer is a ground for discharge. The Commissioner of Investigation incorrectly advised appellant that he would be discharged for refusal to answer under § 903 of the New York City Charter (R. 7), an assertion inconsistent with the facts since appellant was not a city employee, and incorrect on the law, as ultimately announced by this Court in *Slochower*. The Commissioner did not state that appellant would be discharged under the Security Risk Law for invoking his constitutional privilege.

Appellees' notice of appellant's suspension merely recited the provisions of the Security Risk Law and appellant's assertion of the Fifth Amendment, and did not refer to his duties as an employee. The inference of disloyalty drawn here from invocation of the constitutional privilege is as improper as the inference of non-probity drawn in *Konigsberg* from refusal to answer based upon other constitutional rights.

VI.

The Right of Association.

In *Garner* this Court emphasized the fact that it was dealing with a disclosure statute and that it was not deciding whether discharge for membership in the Communist Party could be constitutionally sustained. Unless appellant prevails under the *Slochower* or *Konigsberg* doctrines, the right of a public employee to join a political organization must be adjudicated in the present case. For the discharge here is based and sustained in the Courts below, upon the assumption that behind the refusal to answer is possible membership in the proscribed organization, the Communist Party. Hence, the elaborate judicial delineations below of the nature of the Communist movement (R. 20, 31, 35, 52).

Therefore, it is relevant to consider the arguments made in Point IV of our principal brief with respect to this subject, and particularly to the absence of *scienter*.

Appellees make no claim that the Court below had interpolated *scienter* into the statute as was done by Maryland in *Gerende* v. *Election Board*, 341 U. S. 56. Appellees merely state negatively that the Court below "has not interpreted" the Security Risk Law in the manner found deficient in *Wieman* v. *Updegraff*, 344 U. S. 183. The failure of the Court of Appeals to do what the Maryland Court did in *Gerende*, the language of the New York Court of Appeals in its principal opinion in this case, and the language of the Security Risk Law, make it clear that *scienter* is not one of the elements of the statute. If it were, it would be an additional reason for refusing to infer guilty conduct from invocation of the Fifth Amendment.

The requirement of *scienter* in the Feinberg law—a radically different statute—(see our principal Brief, pp. 18-19)—does not justify the assumption that *scienter* is required by the Security Risk Law (Appellees' Brief, p. 18).

VII.

The Federal Privilege Against Self-Incrimination.

The appellees seem to have misunderstood our assertion of rights under the Fifth Amendment and under the privileges and immunities clause of the Fourteenth Amendment (Appellant's Brief, Point V, pp. 25-27).

We have some doubt as to whether the state may enter the federal domain by enacting a statute intending to aid the national defense—even though its effect is limited to state employees. But that problem need not be resolved, for if the state was constitutionally authorized to do so, it was acting to that extent as an agent of the federal government and hence subject to the latters' disabilities. The Commissioner's status as a city employee and presently claimed agent of the appellees does not negate this legal result. Appellant was therefore entitled to assert—as he did in terms—his federal constitutional privilege, without punishment by the state. His right to assert the federal privilege was an immunity and privilege within the meaning of the Fourteenth Amendment.

Should the Court hold that the proceeding below was totally lacking in federal character imputed to it, appellant would then seek reconsideration of this Court's decision in *Adamson* v. *California*, 332 U. S. 46. We believe, however, that a decision favorable to appellant can be made upon the other grounds set forth above and that a review of the *Adamson* doctrine is unnecessary to decide this case.

Respectfully submitted,

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APPENDIX A

Appellees' Position in the State Supreme Court on the Respective Functions of the Court and Commission.

"So far we have argued that the Security Risk Law is constitutional and does not deprive petitioner of any of the constitutional guarantees relating to due process. If the law is constitutional, it is clear that any determination made and action taken thereunder by the Authority may not be examined into, reviewed or corrected by this Court in a proceeding under Article 78 of the Civil Practice Act. * * *"

* * *

"While it is true that the cases are in conflict as to the right to maintain certiorari in advance of appealing to the State Commissioner of Education under Section 310 of the Education Law, it is submitted that the Court of Appeals has never passed upon the point. Moreover, the fact that the Legislature spelled out in detail the provision relating to appeals under the Security Risk Law, as contrasted with the somewhat meager provisions of the Education Law, and provided that the decision of the Civil Service Commission should be final and conclusive and not subject to review in any court, clearly shows that the Legislature intended that appeal to the State Civil Service Commission should be the exclusive remedy under the Security Risk Law.

"It is quite apparent from a reading of the Security Risk Law as a whole, and from a careful consideration of the procedure which is set up therein, that the petitioner has no recourse to the courts unless it is solely for the purpose of seeking a judicial determination that the law itself is unconstitutional. If, however, the Security Risk Law is a valid exercise of the legislative power, then the petitioner's only remedy for review of the determination of the Authority is an appeal to the State Civil

Service Commission as provided in the law. Obviously, the legislative will would be thwarted were there to be a review of the findings of the employing agency by a court rather than by the State Civil Service Commission.

"In this connection, it is instructive to compare the appeal provision of the Security Risk Law (Section 1106) with that of the Civil Service Law (Civil Service Law, Section 22(c)). It will be noted immediately that the Civil Service Law gives the employee a right of election—that is, he may either take an appeal to the Municipal or State Commission, or he may bring an Article 78 proceeding. The fact that no election is given here shows a legislative intent that there should be no court review of determination made under the law" (Appellees' Brief in the State Supreme Court, pp. 19-23).

APPENDIX B

Appellees' Position Below on the Reasons for the Discharge of Appellant.

Appellees' Brief in the State Supreme Court

"That being the case, when the Commissioner of Investigation reported petitioner's refusal to answer the questions asked him upon a plea of immunity against self-incrimination, the Transit Authority had the right to consider this as evidence directly relating to petitioner's trust and reliability." (p. 7)

* * *

"The petition alleges that 'Assertion of a constitutional privilege cannot be grounds for discharge from employment.' This is a curious statement in light of the fact that Section 903 of the New York City Charter provides as follows:"

[Then follows the text of § 903 and quotations from *Daniman* v. *Board of Education*, 306 N. Y. 532 and the New York State Constitution, Article I, subdivision 6] (*Id.* at 24)

"Therefore, to exercise the discretion of removing the petitioner from his position, all that was required of the Authority was that it have reasonable grounds for belief that he was a member of the Communist Party. It did not have to have absolute proof of such membership, but merely reasonable grounds for belief with respect thereto. Certainly, the refusal of the petitioner to answer questions as to past or present membership in the Communist Party *on the ground that his answers might incriminate him* (not on the ground that his questioner had no power or right to examine him) was enough to afford reasonable grounds for belief that he was a Communist, even though it might not be positive proof thereof." (*Id.*, 26-27)

* * * *

"It is highly significant that nowhere in petitioner's papers is there any allegation or even an intimation that petitioner is *not* a member of the Communist Party, nor is there any suggestion that had petitioner been examined under oath by the respondents, rather than by the Commissioner of Investigation, his answers would have been in any way different. It is respectfuly submitted that it is the petitioner's duty, in maintaining a special proceeding such as this, to exhibit good faith to the court. If there is any disposition on the part of petitioner or his counsel seriously to contend that petitioner is not or was not a member of the Communist Party, certainly such a statement should appear somewhere in petitioner's papers. Without making such a statement, he is, in effect, asking the Court in this proceeding to order the respondents to take back into their employ in a security agency position a man who, in the light of what has occurred, there is reasonable ground to believe is a member of the Communist Party, and who, if this is so, is definitely a security risk. This certainly is asking the Court to assume a grave responsibility." (*Id.* at 29-30)

• • •

"It is therefore well established in the law of this state that the pleading of a constitutional privilege or a refusal to waive a constitutional privilege may be grounds for removal from public office or employment" (*Id.* p. 26)

• • •

Appellees' Reply Brief in State Supreme Court

"The test established by the Security Risk Law has been met in the instant case. Surely it cannot be said that it is unreasonable to conclude that a man who refuses to reply on the ground of possible self-incrimination when asked point blank about membership in the Communist Party (not a political party, but a subversive organization) is a proper person to have in a position in a security agency." (p. 11)